Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

October Term, 1998

JOSEPH NOWAK,

Petitioner,

v.

SCHOOL BOARD OF PALM BEACH COUNTY, FLORIDA,

On Petition for Writ of Certiorari
To The Florida Supreme Court,
Fourth District Court of Appeal of Florida
Circuit Court of Palm Beach County, Florida

PETITION FOR WRIT OF CERTIORARI

Joseph Nowak
3101 Canal Drive
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QUESTION PRESENTED

Should this Court grant review where the United States Constitution states this Court shall have Original Jurisdiction when a state is a party and in order to require a state to reinstate a jury verdict when a citizen has been denied the United States Constitutional guaranty of the equal protection of the law by state judges, who are defined by this Court as "state actors," when a trial court has usurped the function of the jury and overturned the jury verdict based upon the trial court's re-analysis and re-interpretation of the facts of the case?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE SUPREME COURT
OF THE UNITED STATES

PETITION FOR WRIT OF
CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court, a court of appeal, to review the merits appears at Appendix A to the petition and is unpublished.

The opinion of the state trial court overturning the jury's verdict appears at Appendix B to the petition and is unpublished.

The opinion of the state supreme court to deny review appears at Appendix C and is unpublished.

JURISDICTION

TIME

The date on which the Florida Supreme Court refused to review my case was on December 8, 1998. The 90 day time limit for the filing of this Petition expires on March 8, 1999.

ORIGINAL JURISDICTION

The jurisdiction of this Court is invoked under the United States Constitution, Article 3, Section 2 for having original jurisdiction in all cases in which a state shall be a party where such cases are also brought under equitable principles and not strictly under statutory laws. UNITED STATES V. TEXAS, 12 Sup. Ct. 488 (1892)

Also, this Court has jurisdiction to decide a case involving state court(s) denial of the United States Constitution guaranty of the equal protection of the law in discrimination cases. ROGERS V.ALABAMA, 24 Sup. Ct. 257 (1904)

Also, this Court has held

that a state court is a "state actor" when it enforces discriminatory conduct and "has not only made itself a party to the [biased act], but has elected to place its power, property and prestige behind the [alleged] discrimination." EDMONSON V. LEESVILLE CONCRETE CO., INC., 111 S. Ct. 2077, 2085 (1991)

The jurisdiction of this Court is invoked under 28 U.S.C. S 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

PROVISIONS OF
THE UNITED STATES

United States Constitution
Article 3 Section 2

". . .In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction."

United States Constitution
Amendment 14, SECTION 1

"No state shall . . . deny to any person within its jurisdiction the equal protection of the law."

PROVISIONS OF FLORIDA
JURY TRIAL -INVIOLABLE RIGHT
FLORIDA CONSTITUTION, ART. I, SECT. 22

"Trial by Jury - The right of trial by jury shall be secure to all and remain inviolate."

JURY TRIAL AS A STATUTORY RIGHT

Section 760.11 Florida Statutes

"The right to a trial by jury shall be preserved."

RETALIATION PROHIBITION

Section 760.10(7), Florida Statutes

"It is an unlawful employment practice for an employer to discriminate against any person because that person has opposed any practice which is an unlawful employment practice or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section."

CONCISE STATEMENT OF THE FACTS OF THE CASE

Petitioner Joseph Nowak worked for the State of Florida as a male English teacher for four immediate female supervisors. For twenty-four years he had perfect evaluations from Principals and even school superintendents in Illinois and Florida. In 1993, he made a charge of discrimination for disparate assignment by his female supervisors favoring female English teachers in assignment of courses, of work locations, of isolation of Petitioner from colleagues, of numerous evaluations, harassment and creation of hostile work environment, none of which treatments were received by female English teachers.

After making his complaint, the State of Florida took even more severe retaliatory steps for several years, of excessive and intimidating evaluations, breaches of contract and policies, involuntary transfers, isolating Plaintiff

further from colleagues, and eventually forcing Petitioner toward a nervous breakdown as testified to by a psychologist and eventually forcing him from teaching.

After a two week trial, a jury found the State of Florida had retaliated against Petitioner after his charge of discrimination. The trial court instructed the jury to disregard testimony and documents already in evidence and threw out Petitioner's two claims of disparate treatment and gender harassment prior to the jury's deliberations and instructed the jury to disregard those claims.

After two days of deliberations, the jury still found the evidence supported a jury verdict against Respondent State of Florida for its retaliation. By doing so, the jury implicitly found the reasons cited in the Final Judgment and argued by the State of Florida were pretexts for retaliation.

After dismissing the jury, the trial court then granted the Defendant State of Florida's motion for a full

directed verdict. In doing so, as clearly seen in the Final Judgment, the trial court re-examined and put its own spin on the same facts the jury, composed of six reasonable persons chosen by both parties in jury selection, who had seriously considered the same evidence in its two days of private deliberations. The jury could have ruled as did the trial court. But instead, the jury obviously found Defendant had used pretextual excuses to justify its retaliation.

Although the trial court accepted part of the jury verdict which supported its decision after the court threw out half of the evidence, in contrast, it substituted its interpretation of the facts and the documents and the testimony of many witnesses in the two week trial for that of the jurors as to the supporting facts and decision it did not agree with by stating that the Defendant was justified in its actions of retaliation. The trial court also ignored literally volumes of evidence and the testimony of expert witnesses such as

psychologist and even its own prior court rulings regarding the timely filing of the charges against the State of Florida by then making the filing of charges an issue and using ex post facto case law against Petitioner.

Petitioner immediately raised the issue on re-hearing that to overturn the jury's verdict on a re-examination of the evidence by a trial judge violated his constitutional rights.

Petitioner raised the denial of constitutional rights in his Appellate Briefs and in his Petition to the Florida Supreme Court but neither the Fourth District Court of Appeal of Florida nor the Florida Supreme Court would address constitutional issues nor any issues of law and the facts on their merits.

Joseph Nowak petitions this Honorable Court with its original jurisdiction where a state is a party under the United States Constitution to reinstate the jury's verdict against the state to grant him the equal protection of the law guaranteed under the highest law of the land.

REASONS FOR GRANTING THE PETITION

In cases cited, this Court has spoken much more eloquently than any petitioner ever could about the importance of granting this petition to reinstate a jury verdict and to order a judgment entered on a jury's verdict against a state.

Such a ruling has meaning not only in this case but it would re-affirm the importance of jurys in society and their role in the Court system. And your ruling would be an oasis in a desert for every civil litigant who seeks equal justice with a true and effective trial by jury in every court in this country especially when he or she is up against the power and the prestige of the state government as a defendant and the power and prestige of trial judges.

This Court has said:

> "The jury exercises the power of the court and of the government functions of guarding the rights of litigants and ensuring continued acceptance of the laws

by all of the people." EDMONSON V. LEESVILLE CONCR. CO., INC., 111 S. Ct. 2077, 2085 (1991)

Regarding similar provisions for jury trials in federal courts under the Seventh Amendment that citizens of Florida are also supposed to enjoy under the Florida Constitution, this Court also said:

> "In the federal system, the Constitution itself commits the trial of facts in a civil cause to the jury. . . the jury becomes the principal factfinder, charged with weighing the evidence, judging the credibility of witnesses, and reaching a verdict. The jury's factual determinations as a general rule are final. . . the jury can weigh the gravity of the wrong and determine the degree of the government's interest in punishing and deterring willful misconduct. . . In all jurisdictions a true verdict will be

> incorporated in a judgment enforceable by the court. Id at 2085.

In the EDMONSON case, also at page 2085, this Court said that a judge, "beyond all question is a state actor." And if the judge participates in discrimination, the judge has not only made the court itself a party to the [biased acts], but has elected to place its power, property and prestige behind the discrimination.

In the present case, the beginning of the Final Judgment states that petitioner proved to the jury that there was retaliation by the Defendant State of Florida on the few issues the trial court allowed Petitioner to take to the jury such as retaliation because the jury brought back a verdict for petitioner on retaliation and found substantial damages of $102,668.00.

Petitioner met his burden to prove his case by the greater weight of the evidence not only of the State of

Florida's actions of retaliation, but also in its neglect to enforce its own laws and its breach of the School Board's own contracts and policies. Negligence and breach of contract are common law causes of action. And they are clearly a breach of discrimination laws. MILLER V. FAIRCHILD INDUSTRIES, INC., 885 F. 2d 498 (9th Cir. 1989)

In 1942, Mr. Justice Murphy delivered an opinion in this Court about the sanctity of jury trials and jury verdicts in which he said:

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. **A right so fundamental and sacred** (emphasis is added because of the extreme importance, indeed sacredness, to your Honor's predecessors) to the citizen, whether guaranteed by the constitution or provided by statute, should be jealously guarded by the

> Courts. . . . We are called upon to determine whether on the evidence adduced by petitioner, and in contravention of accepted judicial standards, petitioner was wrongfully deprived of his statutory right to a jury trial by the action of the trial court in dismissing his complaint in refusing to submit the case to a jury which had been duly empanelled to try it. In holding that petitioner had failed to prove facts sufficient to the trial court" Certiorari was granted. JACOB V. NEW YORK, 315 US 752 (1942)

The JACOB case involved questions of both equity and law and was also a case in which a state was a party as in this case. That this case should be reversed and the verdict re-instated is even further shown by the lengthy discussion of the evidence in the Final Judgment, at pages B- none of which areas of facts and evidence did the trial court construe to favor

the non-moving party, the Plaintiff-petitioner as required by the rules governing directed verdicts.

For example, a fair interpretation of the evidence trying to be RE-explained by the trial judge on Appendix page B-5, Number 1, is that excessive numbers of evaluations of Plaintiff were shown during the trial to the jury and that the evaluations were unprovoked, in-your-face, intimidation, by female supervisors trying to provoke plaintiff into a burst of emotion after 24 years of perfect evaluations an one complaint.

On number 2. The trial court's mention of children being used by Defendant to evaluate a teacher was proven to be a violation of the school board contract. And the evidence showed there were not "complaints" but proof was shown one parent called in with only a concern, not even a complaint.

On number 3, a false failing mark in an evaluation was part of Defendant's

overall scheme where two failing marks was admitted could be grounds for Defendant to fire Petitioner, even if the failing mark was false. The failing mark was proven to the jury to be unjustified and a pretext which the trial court could have interpreted favorably for Petitioner as did the jury.

On number 4, isolation from colleagues and kept from staff meetings is a form of retaliation, even in the cases cited in the judgment especially when Defendant made claims and tried to make it appear plaintiff was not attending staff meetings which were simply pretext excuses by Defendant.

On number 5, this is true, there was NO investigation of discrimination only retaliation by Defendant's managers trying to force plaintiff to quit teaching.

On number 6, a false charge of gross insubordination for not turning in lesson plans that had already been turned in by Petitioner was admitted in open court by Defendant's supervisors to be a basis for firing. But the trial court did not remember

this or did not wish to construe this fact favorably for Plaintiff.

On number 7, not liking Shakespeare was not proof of Defendant's wrongdoing other than the perjured testimony by the female department head about Plaintiff. But it was one element among many that proved her lack of credibility. But the trial court accepted this perjury and lack of credibility evidence as trivial even when credibility should not be re-examined on a motion for directed verdict because this Court has said that function is for the jury.

On number 8, involuntary transfers and demotions and isolation from colleagues and breaches of contract are forms of discrimination even in the cases cited in the Final Judgment. And the question of when Plaintiff decided to resign after he was involuntarily transferred by Defendant's breach of contract is as clear a "classic question of fact for resolution by a jury," and not a trial judge, as any issue of fact can be. PENDLETON V.

CONOCO, INC., 23 F. 3d 281, 287 (US 10th Cir. 1994)

It is so incredible to this ordinary citizen that a trial judge would so misapprehend the facts and the law and even take a case from the jury where first, the trial court would not allow the jury to examine or rule on half of the evidence and so instructed them (Appendix D). But still, the jury found the facts and the evidence did substantially prove plaintiff's claim of retaliation and this after hearing the judge's jury instructions on the law and what constitutes discrimination and retaliation and pretexts. On motions for directed verdicts, the Final Judgment, by weighing, and then re-evaluating the evidence, violates the standards on directed verdicts as compared to allowing the jury to decide the case. This Court has said:

> (The cases cited by this Court) "are decisive of the question arising on the motion for judgment on the evidence notwithstanding the verdict. They

> show that it is the province of the jury to hear the evidence and by their verdict to settle the issues of fact, no matter what the state of the evidence . . . the court cannot dispense with a verdict, or disregard one when given and itself pass on the issues of fact. SLOCUM V. NEW YORK LIFE INSURANCE CO., 33 S.Ct. 523, 532 (1913)
>
> "It follows that the demurrer ought NEVER to be admitted where the party demurring refuses to admit the facts which the other side attempts to prove; and it little justifiable where he offers evidence, or attempts to establish inconsistent propositions." SLOCUM, page 533

If the Judgment is not clear enough on its face that it violates all of the law on standards for directed verdicts, the role of the jury and the sanctity of verdicts and the constitution, then

Petitioner hereby tenders the nineteen or so volumes of court reported transcript of the trial and the evidence of discrimination and retaliation by Defendant as aided by the trial court even though the federal courts have held the amount of evidence and inferences that must be produced to create a prima facie case for the jury to decide in a discrimination case is "very little." Plus,

> "Our precedents indicate the importance of allowing the fact finder to consider the existence of discrimination . . . The question of an employer's intent to discriminate is a pure question of fact. . . The ultimate question is one that can only be resolved through a 'searching inquiry' - one that is most appropriately conducted by the fact finder upon a full record. SISCHO-NOWNEJAD V. MERCED COMMUNITY COLLEGE DIST., 934 F. 2d 1104, 1110-1111 (9th Cir. 1991)

The trial court in the Judgment on Appendix page B-5 says he only examined a few minute details of examples cited by Petitioner's trial counsel's recitation of facts in a five minute hearing in contrast to the two week jury trial. On App. B-9, he construed most favorably for the State its pretext excuses as a valid position instead of the pretexts they were as the jury implicitly found.

And Petitioner did suffer harm and damages because a victim's state of mind as well as intent are factual issues. And a psychologist testified about these issues.

For Twenty Four years as an English teacher I have tried to teach children of all school ages the meaning and importance of words and the qualities of good citizenship from English literature, (including Shakespeare.) And even this Court recognized the state's role in eliminating discrimination in education by saying:

> "Education is perhaps the most important function of state and local

> governments. . . it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training and in helping him to adjust normally to his environment. . . where the state has undertaken to provide it, it is a right which must be made available to all on equal terms." BROWN V. BOARD OF EDUCATION, 347 U.S. 483 (1954)

But for literally years, I was discriminated against and then retaliated against when I made a complaint. I found the ideals and the standards of excellence I had taught mean little. When I entered the court system I found the legal standards for jury trials, and the sanctity of, jury verdicts mean even less to all levels of the Florida courts. While it is clear that one black person in one bad restaurant encounter or one woman in one sexual encounter, can complain about discriminatory working conditions and seek a jury trial and have the merits fairly examined, it is also

clear that a white, heterosexual men and other men similarly situated can have literally years of discrimination and retaliation and be denied equal protection of the law and even less than a fair hearing in Florida courts unless the jury's verdict is reinstated and courts are instructed that they are there to allow the juries of this country to fairly hear all of the evidence, and to evaluate the cases, and to come to an enforceable verdict. If juries are not allowed to decide cases, then the words of this Honorable Court about "juries guarding the rights of litigants" and "sacred" rights and the "jury verdict as final" and schools as places to learn values and to stop discrimination are wasted and meaningless words for state courts.

If any person would ever wish to try to trust the courts, all lawsuits would have to be brought only in federal courts where the Seventh Amendment applies and where maybe this Supreme Court will hear the petition if a litigant is denied a jury trial. Petitioner was denied

the United States Constitutional Equal Protection of the law in suing the State of Florida, his employer, even though there is a common law discrimination and retaliation case based on tort and contract in Florida, e.g. DUVAL LAUNDRY CO V. REIF, 177 So. 726 (1938) and even though the Florida Constitution and the legislature has said "The right to trial by jury is preserved" and even though other Florida appellate courts in other parts of the state have held that the ultimate question of the existence of discrimination is a question of fact. FLORIDA DEPT. OF COMMUNITY AFFAIRS V. BRYANT, 586 So. 2d 1205, 1209 [1] (Fla. 1DCA 1991) So, in some courts of Florida, maybe a person will be allowed to have a jury trial. But in this case with the State as a Defendant, Petitioner was denied a trial and denied the equal protection of the law. And this was in spite of a law that said the right to a jury trial is preserved on retaliation common law

cases.

Even in the trial court's opinion on petitioner's giving of notice at the end of the Final Judgment, the court ignored it's own previous rulings by a predecessor judge. The trial judge allowed the case to go to the jury instead of granting the directed verdict at the close of plaintiff's case or granting a summary judgment. The issues of notice should have been applied using equitable principles as the case law states. Equitable principles should be applied in the giving of notice to Defendant to try and cure the discrimination rather than to initiate Defendant's retaliation. The cases are: GALLEGO V. ARTHUR G. MCKEE & CO., 550 F. 2d 456 (9TH Cir. 1977), LOVE V. PULLMAN, 92 S. Ct. 616, 619 (1972) and LEAKE V. UNIVERSITY OF CINCINNATI, 60 F. 2d 255 (6th Cir. 1979)

In a portion of the appeal to the Florida appellate level court and petition to the Florida Supreme Court, Petitioner's counsel raised the constitutional issues of denial of his constitutional

protection of the laws and the foregoing case law and even this Court's case of HARRIS V. FORKLIFT SYSTEMS, INC., 114 S. Ct. 367 (1993) in which Justice Scalia compared discrimination cases to negligence cases, ie, traditional jury cases. But such law and principles were without effect or fell on deaf ears.

CONCLUSION

Your Petitioner submits the petition for a writ of certiorari should be granted to preserve the sacredness of jury trials, to stop discrimination in state schools, and to preserve the United States Constitution's guaranty of Equal Protection in all trial courts.

Respectfully,

Joseph Nowak

Date: February 20, 1999

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SCHOOL BOARD OF PALM BEACH COUNTY, FLORIDA,

On Petition for Writ of Certiorari
To The Florida Supreme Court,
Fourth District Court of Appeal of Florida
Circuit Court of Palm Beach County, Florida

APPENDIX FOR PETITION FOR WRIT OF CERTIORARI

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IN THE DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1998

JOSEPH NOWAK,
Appellant,

v.

SCHOOL BOARD OF PALM BEACH COUNTY,
Appellee.

CASE NO'S. 97-2315 and 97-3900

Decision filed August 5, 1998

Consolidated appeals from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Jack H. Cook, Judge; L.T. Case No. CL 94-4205 AJ.

William Riker, Esq., North Palm Beach, for appellant

Phillip D. Parrish, Esq., Stephens, Lynn, Rein McNicholas, P. A., Miami, for appellee.

PER CURIAM.
AFFIRMED.

POLEN, TAYLOR, JJ., and FRUSCIANTE, JOHN A., Associate Judge, concur.

NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.

APPENDIX A

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR
PALM BEACH COUNTY

JOSEPH NOWAK,
Plaintiff,

vs. CASE NO.: CL-94-4205 "AJ"

SCHOOL BOARD OF
PALM BEACH COUNTY,

Defendant.
_____/

**FINAL JUDGMENT AND ORDER
DIRECTING VERDICT
FOR THE DEFENDANT**

This matter was tried before a jury during the two week period between May 20 and June 2, 1997. At the close of all of the evidence, the Defendant, School Board of Palm Beach County, moved for a directed verdict on all of the Plaintiff's claims for sex discrimination, constructive discharge and retaliation in violation of Florida Statutes §760.10, the Florida Civil Rights Act. I reserved ruling on the motion and submitted the case to the jury, which ultimately found no liability as to the claims for sex discrimination and retaliatory discharge, but awarded damages of $102,668.00 on the claim for retaliation. For the

reasons set forth below, I now grant the Defendant's Motion ForDirected Verdict and enter a Final Judgment for the Defendant as to all claims.

In considering the motion for directed verdict, I am mindful that it is not my job to sit as a super juror and to replace the jury's findings of fact with my own. The question on this motion is whether considering the evidence in the light most favorable to the Plaintiff, it is sufficient to support a verdict for the Plaintiff. I find that it is not. The Florida Civil Rights Act is of relatively recent origin and the case law construing it is sparse. But, the act is patterned after the Federal law (Title VII) and accordingly, Federal cases are instructive. Those cases are consistent that to prove a claim for retaliation, the Plaintiff must prove the following three elements. First, that he engaged in some activity protected under the act; second, that an adverse employment activity occurred with reference to him and; third, that there is a causal link between his protected activity and

the adverse employment action. In the Eleventh Circuit Court of Appeal, this causal link has been found to mean that the Plaintiff must only establish that protected activity and the adverse employment action are not completely unrelated, Coutu v. Martin County Board of County Commissioners, 47 F.3d 1068 (11th Cir. 1995)

Under Federal law, if the Plaintiff sets forth a prima facie case of retaliation, then the burden shifts to the employer to provide a legitimate non-retaliatory reason for the employment action, at which time the Plaintiff must then prove by a preponderance of the evidence that the non-retaliatory reasons are a mere pretext for the otherwise prohibited act, see Dey v. Colt Construction and Development, 28 F.3d 1446 (7th Cir. 1996).

In this case, I find that while the Plaintiff proved he engaged in a protected activity, he failed to present any evidence of an adverse employment action or that any action taken by the Defendant did not have a legitimate non-retaliatory

purpose and was only a pretext for prohibited retaliatory action.

The protected activity engaged in by Mr. Nowak was his complaints alleging a gender-based hostile work environment at the Wellington High School. These complaints were made to both the principal at the high school, Mona Jensen, and the Superintendent of the Palm Beach County School Board, Monica Ulhorn, in the summer and fall of 1993. While the jury concluded that there was no hostile work environment, a decision supported by the overwhelming weight of the evidence, it is not necessary that the Plaintiff's complaint be factually accurate. It is sufficient if the complaint is made in good faith, see Coutu, Supra, at 1074. The evidence supports the proposition that however wrong-headed Mr. Nowak's perceptions of a hostile work environment might have been, they were nevertheless made in good faith.

I find however that the Plaintiff has failed to establish any evidence of an adverse employment action taken against him by

the School Board of Palm Beach County. The jury was not asked to state the acts which they found retaliatory. But, when asked to specify the retaliatory acts directed toward Mr. Nowak, his counsel enumerated the following:

1. He was evaluated three or four times during the school year of 1993-1994, when most teachers are only evaluated once per school year;
2. Four of his students were interviewed following parental complaints that he demeaned students in class and gave them tests over material without allowing adequate time for it to be read and without conducting a review of the material;
3. He received one failing markout of sixteen on an evaluation in 1994;
4. He did not receive notice of English Department meetings;
5. There was no investigation of the complaints of sexual discrimination within the English Department;
6. He received a letter from Principal Jensen asking him to turn in his lesson plans and stating that failure to do so would constitute gross insubordination;
7. Someone said he didn't like Shakespear; (sic)
8. He was transferred to Spanish River High School in

1996. Neither party introduced into evidence either Mr. Nowak's letter of resignation or the letter reassigning him to Spanish River High. But, Mrs. Nowak testified that she and Mr. Nowak planned to start their new business in the summer of 1996 and that by July of that year, they knew they were not returning to the teaching profession. This was before the reassignment.
I find that as a matter of law none of these acts or any other act contained in the evidence constitutes an adverse employment action. The Federal Circuit Courts of Appeal are not consistent in their definition of an adverse employment action. In the Fifth Circuit for instance, the court has held Title VII was designed to address ultimate employment decisions and not to address every decision made by employers that arguably might have some tangential affect upon such decisions, see Mattern V. Eastman Kodak Company, 104 F.3d 702 (5th Cir.1997) and Dollis v. Rubin, 77 F.3d 777 (5th Cir. 1995). In Mattern, the Fifth Circuit noted that an ultimate employment decision includes acts "such as hiring, granting leave, discharging, promoting and compensating.", at 782. But, that "hostility from fellow

employees, having tools stolen and resulting anxiety, without more do not constitute ultimate employment decisions and therefore, are not the required adverse employment actions", at 715.

Courts such as the Seventh Circuit have a broader concept of adverse employment action. In Smart v. Ball State University, 89 F.3d 437, at 441 (7th Cir. 1996), the Court did not define adverse employment actions, but observed that even using a broad definition of adverse employment action, it still does not include everything that makes the employee unhappy and does not extend to Otherwise minor and trivial employment actions that an irritable, chip-on-the shoulder employee did not like . . .'" Thus, it does not include claimed humiliation caused by the creation of a co-principal position; a lateral transfer with accompanying bruised ego; or an undeservedly poor evaluation, Smart, at 441.

The Eleventh Circuit has not specifically defined "adverse

employment action,' in the context of Title VII, see Wu v. Thomas, 996 F.2d 271, 274 (11th Cir. 1993). However, in that case the Court observed at 273:

> "But plaintiffs do not cite and we do not find any case that clearly establishes that retaliatory harassment - as opposed to sexual or racial harassment - could violate Article VII where the employer caused the employee no tangible harm such as loss of salary, benefits or position. . . ."

In the context of section 1983 actions, the Eleventh Circuit has broadly defined "adverse employment action" to include not only discharges but also refusals to hire, refusals to promote, and reprimands, McCabe v. C.E. Sharrett. Jr., 12 F.3rd 1558, 1563 (11th Cir. 1994) and Rogers v. Miller, 57 F.3rd 986, 992 (11th Cir. 1995).

I find that none of the actions complained of by the Plaintiff or any combination of those actions constituted an adverse employment action on the part of the Defendant. This is true whether the more restrictive definition employed by the

Fifth Circuit is applied or the broader definitions employed by the Seventh and Eleventh Circuits. While the actions of the Defendant's administrators and supervisors appeared to make Mr. Nowak unhappy, they caused him no tangible harm. He suffered no loss of salary, benefit or position and received no reprimand. The matters complained of fall into that category of acts referred to by the Seventh Circuit in Smart v. Ball State, supra, at 441, as "minor or trivial employment actions that 'an irritable, chip-on-the shoulder employee did not like. "

Moreover, even if some of this activity could be characterized as adverse employment activity, the Plaintiff failed to present any proof that it was taken as a pretext for retaliation as opposed to for legitimate purposes as outlined by the School Board. The first three complaints resulted from semester exams where 51% of Mr. Nowak's students in all of his classes received an "F" and another 26` received a "D" grade. During this same year, parents were complaining that Mr. Nowak

was berating students in class. It would have of duty for the Defendant's administrators not scrutinize Mr. Nowak and to investigate how he classes. Complaints 4 through 7, as set forth trivial as to be inconsequential and complaint been a dereliction to closely was conducting his above, are so number 8 is both remote in time (three years after the protected activity) and unconnected to the protected activity by anything other than speculation and conjecture.

The Defendant also alleges that the Plaintiff's claim is barred by his failure to comply with the administrative remedies provision of Florida Statutes §760.11. Although no Florida State Appellate Court has addressed this question, I find the reasoning in Ayers v. Wal-Mart Stores. Inc., 941 F. Supp. 1163 (M.D. Fla. 1996), persuasive and find that the Plaintiff's failure to proceed as set forth in Florida Statutes §760.11, also requires that a verdict be directed in the Defendant's favor.

Accordingly, for the reasons set forth above, I grant the

Defendant's Motion For Directed Verdict on the claim for retaliation and it is Ordered and Adjudged that the Plaintiff shall take nothing from this action.

I reserve jurisdiction to consider the question of costs and attorney's fees at a later date.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida, on this 6TH day of June, 1997.

S/_____
JACK COOK
CIRCUIT COURT JUDGE

Copies furnished:

William Riker, Esq., Suite 104, 321 Northlake Blvd., North Palm Beach, Florida 33408

Edward Polk, Esq., 2 Datran Center, 9130 S. Dadeland Blvd., PH 1 & 2, Miami, Florida 33156

Supreme Court of Florida

TUESDAY, DECEMBER 8, 1998

JOSEPH NOWAK,

Petitioner,

v. CASE NO. 94,008

SCHOOL BOARD OF PALM BEACH COUNTY, FLORIDA,

Respondent.

* * * * * * *

ORDER DENYING PETITION

The petition for writ of mandamus/certiorari is hereby denied as procedurally barred. Extraordinary remedies are not a second appeal and cannot be used to litigate or relitigate issues which could have been or actually were raised on direct appeal. See Breedlove v. Singletary, 595 So. 2d 8, 10 (Flat 1992); Mills v. Dugger, 574 So. 2d 63, 65 (Flat 1990).

OVERTON, SHAW, WELLS, ANSTEAD and PARIENTE, JJ., concur.

APPENDIX C-1

A True Copy
TEST:
Sid J. W Supreme Court

hite
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(clerk S FLORIDA

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cc:
Mr. William Riker
Mr. Philip D. Parrish
Hon. Jack H. Cook, Judge
Hon. Marilyn N. Beuttenmuller, Clerk
Hon. Barry J. Stone, Chief Judge

APPENDIX C-2

IN THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL
CIRCUIT IN AND FOR PALM BEACH
COUNTY, FLORIDA

JOSEPH NOWAK,
Appellant, Plaintiff

vs. No. 94-4205 AJ

SCHOOL BOARD OF PALM BEACH
COUNTY, FLORIDA,

Appellee, Defendant.

Thereupon, the above-styled cause came on for Jury Trial in the 15th Judicial Circuit, in and for Palm Beach County, Florida, commencing on May 19, 1997.

VOLUME VIII

APPENDIX D-1

TRIAL EXCERPT

* * * * * * * * * * *

THE COURT: At this time, Ladies and Gentlemen, you may proceed with your deliberations.

JUROR NUMBER 3: You gave us an instruction yesterday morning. I would like you to repeat the instruction.

THE COURT: That I have removed from your consideration -- I had removed from your consideration anything dealing with assignment of classrooms or assignment of classes.

Okay. Okay. Thank you, Ladies and Gentlemen. You may proceed with your deliberations.

Thereupon, the jury panel (enters the jury room at 2:44 p.m.)

THE COURT: Counsel, would you all come up at this time before you send the exhibits back. And let's go through these and make sure everything that needs to go back goes back, and anything that doesn't need to go doesn't go back.

Any objection as read other than what we

talked about?

MR. POLK: Not as to what was read. The Court didn't mention field trips.

THE COURT: That was the other item.

MR. RIKER: I feel it was -

THE COURT: Assignment of classrooms.

MR. RIKER: Your Honor, I feel again that instruction can be misleading to the jury, because - -

THE COURT: Mr. Riker, I've already given it once. At this point I have to give it. Bring them back in, Mr. Brooks.

MR. RIKER: Your Honor, may I just indicate as far as disparage treatment, but not with respect to hostile.

MR. POLK: Disparage treatment.

MR. RIKER: Please identify that.

THE COURT: The last one.

MR. POLK: Field trips.

THE COURT: Mr. Riker, there was no - my ruling was and is: There is no testimony in

this case from which a reasonable jury can conclude that the assignment of classes or classrooms had anything to do with Mr. Nowak's gender and disparage treatment or anything else. That's the ruling.

MR. RIKER: I didn't understand that.

THE COURT: And the same with the one field trip incident. Now, the only thing that field trip incident had to do with was actually the field trip. Really I think I removed that completely, did I not?

MR. RIKER: Your Honor, with regard to his gender, but not with regard to retaliation and his gender.

THE COURT: There was nothing in here that indicated that that field trip had anything to do with retaliation against Mr. Nowak, Mr. Riker. Zippo. No evidence.

(Thereupon, the jury panel enters the courtroom at 2:46 p.m.)

THE COURT: When you asked me that, I forgot there was one other item that I had mentioned to you. And I think that was also the field trip issue. Okay. Classroom assignments, class assignments and field trip. Okay. All

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right. You may proceed with your deliberations.

(Thereupon, the jury panel enters the jury room at 2:47 p.m.)

THE COURT: Okay. Counsel, if you will come up and go through the exhibits and we can get them back there.

(Thereupon, court is in recess from 2:48 p.m. until until 5:05 p.m.)

THE COURT: Okay. Apparently, Mr. Brooks says the jury would like to recess for the evening and come back on Monday and finish it up. We are going to go ahead and do that. Bring in the jury, Mr. Brooks, and we'll send them out.

(Thereupon, the jury panel enters the courtroom at 5:06 p.m.)

THE COURT: Ladies and gentlemen, I understand you would like to go ahead and recess for the weekend and come back Monday morning to proceed. So we'll go ahead and do that.

If you want to come back earlier than 9:30 even, though, I'll be in hearings, there's no reason that you can't begin your deliberations. You can come back whenever you want to.

JUROR NUMBER 5: 9 o'clock.

THE COURT: Do you want to come back at 9:30?

JURY PANEL: 9:00 sounds good.

THE COURT: 9:00. Okay. If you will just meet Mr. Brooks downstairs then at about 5 to 9:00. Something like that. He'll meet you down there and bring you up here and put you in the jury room.

Now, you've been charged. And, of course, you have the case under consideration. So please be scrupulous about not discussing the case among yourselves or with anyone else during this recess. All jury deliberations must take place in the jury room so that everyone is present. So when you're going to the cars this evening you can talk about anything you want to except the case. And the same for Monday when you gather downstairs. And what will happen, I'll have Mr. Brooks up here. And he'll put you in the jury room

And he will come and let me know. I will take a short recess from my hearings at that time.

And we'll put on the record that all are here and the deliberations have continued.

But I don't really see any need to

bring you back out. He'll just put you in there. And he'll let me know and I'm put that on the record. Thank you very much for your service so far. You're excused for the weekend. We'll see you here on Monday morning at 9 o'clock.

Counsel, you all just may want to just be here or have someone present about 9 o'clock so we'll put on the record that the jury is deliberating at that time.

MR. RIKER: Yes, Your Honor.

THE COURT: We'll be in recess. (Thereupon, court is in recess at 5:10 p.m. and scheduled to resume on Monday, June 2nd, 1997 at 9:00 a.m.)

COURT CERTIFICATE

STATE OF FLORIDA)
COUNTY OF PALM BEACH)

I, KIMBERLEY A. ROSS, a Shorthand Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the excerpt trial transcript is a true and complete record of my stenographic notes.

Dated this 8th day of August, 1997

S/KIMBERLY A. ROSS

KIMBERLEY A. ROSS
MY COMMISSION t CC 522345
MY COMMISSION EXPIRES: JANUARY 27, 2000

PROOF AND CERTIFICATE OF SERVICE

I, Joseph Nowak, do swear or declare that on this date, ~~February~~ March 3, 1999, as required by Supreme Court Rule 29, I have served three (3) copies of the MOTION FOR LEAVE TO FILE, the proposed PETITION, and the foregoing APPENDIX upon each party to the above proceeding by mailing to that party's counsel, by depositing an envelope containing the above documents in the United States mail properly addressed to them and with first-class postage, certified mail, return receipt requested #P131 333 476, prepaid.
The names and addresses of those served are as follows:

Philip Parrish, Esq.
Attorney For Respondent
9130 S. Dadeland Blvd.
Phone number 800 329 2911
Two Datran Center, PH 2
Miami, Fl 33156

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 26, 1999.

Joseph Nowak

Joseph Nowak

3101 Canal Drive

Boynton Beach, Fl 33435

561

736 2715

STATE OF FLORIDA
COUNTY OF PALM BEACH

Before me the undersigned authority personally appeared Joseph Nowak, who is personally known to me or was identified by Drivers License, and upon oath, he states he foregoing is true and correct and that he signed his name to evince same on this 26 day of February, 1999.

Signature Christine A Thompto
printed name _____
(seal) Notary Public
State of Florida

CHRISTINE A. THOMPTO
MY COMMISSION # CC 690678
EXPIRES: October 22, 2001
Bonded Thru Notary Public Underwriters